

# Why You Should Pay Attention To The OECD Bribery Report

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By Laurel Lichty

A new foreign bribery report from the Organization for Economic Cooperation and Development was the hot topic of discussion recently at the World Bank's third biennial meeting of the International Corruption Hunters Alliance (ICHA) in Washington, D.C., a gathering of experts from across 130 nations. The OECD report represents the first of its kind on the issue of international foreign

bribery, and it has significant implications for compliance.

To put the report in perspective, 41 nations are currently parties to the OECD Convention on Combating Bribery of Foreign Public Officials, including the United States, United Kingdom and Australia. The signatory countries have all agreed to criminalize bribery of foreign public officials, including imposition of legal sanctions against violators, with the aim being to fight corruption in international business transactions. With this in mind, the OECD foreign bribery report offers an analysis of 427 cases of the crime of foreign bribery from member nations since the OECD convention came into force in 1999.

As a speaker at the ICHA meeting, I had a unique opportunity to engage with a significant number of my peers regarding the new

report and the following are my key takeaways.

## **What Do Compliance Professionals Need to Know?**

For corporate compliance attorneys, white collar criminal defense lawyers, general counsels of multinational companies and chief compliance officers there is considerable valuable information that can be gleaned from this report. Staying one step ahead of the regulatory enforcers means that multinational companies must be proactive in their adherence to regulatory requirements. The OECD report provides a unique opportunity to anticipate where regulators may be more active in the future and consider how corporate compliance programs can be better equipped to detect corruption.

The report does not provide specifics about particular cases, but it does analyze the available case data revealing totals and trends about corruption in international business transactions. Readers are presented with insight into a number of key questions, particularly: How is the corruption discovered? What types of international business actors are the most common perpetrators? In what industries are bribes most prevalent?

## **How Are Cases Being Discovered?**

Compliance attorneys need to know how cases come to light in order to mitigate damage and ultimately to prevent them. What are the chinks in the armor of compliance programs that are allowing foreign bribes and corruption to infiltrate business transactions? Further, when corruption schemes are discovered by the corporate entities themselves, being a voluntary discloser can reduce imposed sanctions.

In the United States, federal sentencing guidelines allow for lesser penalties for corporations that self-report, as noted

recently in a report from the Wall Street Journal. According to this report, whistleblowers that notify law enforcement account for only 2 percent of foreign bribery cases brought to light. However, internal whistleblowers are actually involved in 17 percent of cases. So in 15 percent of cases, allegations were brought to the attention of the company first, for example by being revealed to the executive board, the audit committee, or reported on an ethics hotline. The finding underscores the value of a company culture that encourages ethics violation reporting and protects whistleblowers by offering an anonymous system for the reporting corruption allegations.

More importantly for the design of corporate compliance programs are findings about the role that internal audits play in detecting corruption. In 31 percent of cases corruption was discovered through internal auditing procedures. Truly effective corporate compliance programs depend upon coordination and collaboration between various business functions. Risk, audit, legal, finance, information technology and human resources all have roles to play. Robust compliance programs require more than simply instituting policies and procedures and conducting ethics and compliance training. Another finding was that merger and acquisition due diligence detected foreign bribery in 28 percent of cases. Further, pre-listing due diligence detected corruption in 3 percent of cases. The lesson here is that companies need to apply greater financial rigor toward their internal anti-corruption compliance procedures. Otherwise, they will just have policies without teeth.

In particular, the report points to a need for more attention on payments made to intermediaries. In a whopping 71 percent of cases, intermediaries were involved in bribery schemes. Agents, suppliers, distributors, subcontractors, as well as subsidiaries and shell companies are example of intermediaries. Regrettably lawyers even acted as conduits for bribes in 6 percent of cases.

Tighter procedures can help detect many of the most common scenarios.

## **What Types of International Business Actors Are the Perpetrators?**

There was some critique at the report release event hosted by the World Bank International Corruption Hunters Alliance conference that the report is too focused on the United States. Whether this is justified is of lesser importance than how U.S. attorneys can benefit from the application of this research. Much of the data in the report comes from U.S.-initiated cases because by some measures the U.S. is in fact the strongest enforcer. Sanctions brought under U.S. law against individuals or entities for the offense of foreign bribery account for 128 separate 'foreign bribery schemes' covered in the report. Due to the extrajurisdictional reach of anti-bribery laws, for example, the Foreign Corrupt Practice Act, this includes non-U.S. entities and individuals. The U.S. is a red, white and blue knight against foreign corruption when the measure is based on sanctions.

The report does not reveal specifics about the cases but it does indicate if CEOs, senior management or board members were implicated as participating in or having knowledge of the bribes in question. Findings include that some public officials from wealthy and middle-income countries were also implicated as taking bribes. This stands in contrast to a common notion of bribery as merely businesses in wealthy countries paying bribes to secure contracts in developing countries. In fact, bribes are being received by public officials in wealthy and middle-income countries too.

## **What Industries and Locations Are Bribes Most Prevalent?**

The OECD report notes that nearly 60 percent of detected foreign bribery cases occur in four industry sectors; (1) extractive (e.g., mining and gas extraction, (2) construction, (3) transportation and storage, and (4) information and communication. It's not vitally important whether these industry groupings make sense but it is useful for executives, in-house attorneys and compliance professionals to know how prevalent foreign bribery is in their industry. This analysis may also suggest the sectors that U.S. regulators may target for enforcement actions in the future.

## **What Else Should Lawyers Take Note of? The Cost of Foreign Bribery**

White collar criminal defenders and insider counsel should be aware that cases are now taking longer to come to resolution, despite the fact that most cases end in a settlement procedure rather than a conviction. In 1999, cases lasted on average two years, but in 2013 cases lasted over seven years on average. Bribes themselves are costly. Bribes totaled \$3.1 billion dollars in 224 cases where this information could be determined. The total actual figure is likely much higher. Committing the crime of foreign bribery can be costly, and may end in prison.

Imposed sanctions totaled \$54 billion U.S. dollars for 427 analyzed cases. 80 individuals received prison sentences for foreign bribery.

## **Moving Forward — The Role of Corporations, Compliance Professionals and Law Enforcement**

Foreign bribery is by definition a transnational problem. Multinational companies and the compliance professionals that advise and serve them have a very important role to play in the fight against foreign bribery. Companies that depend on

international business transactions can do more to strengthen their internal compliance programming. Ever-improving compliance technology, data-mining, and financial records management can provide more stalwart systems. Legal process outsourcing (LPO) can support lean internal legal and compliance teams. Compliance LPO can provide multilingual support, and process reengineering to facilitate collaboration between key internal constituent stakeholders, such as corporate legal, internal audit, accounting or finance departments.

Further anti-corruption investigation tools used by law enforcement could be better utilized by corporations internally. Advancement in technology tools and investigation techniques using open-data provide increased opportunities for inexpensive enhanced due diligence. More public-private partnerships are needed. More strategic alliances can be built between law enforcement, international organizations, academic institutions and private corporations.

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